

EXHIBIT 13

Defendant's Joint Motion for Partial Summary Judgment and Brief in Support

IN THE DISTRICT COURT OF CANADIAN COUNTY
STATE OF OKLAHOMA

FILED
SHARON DILL COURT CLERK
CANADIAN COUNTY OKLA.

JACKIE EUGENE ELLISON, also known
as GENE ELLISON, individually and as
Trustee, et al.,

Plaintiffs,

v.

FPC DISPOSAL, INC., et al.,

Defendant.

Case No. CJ-99-151-01

SET FOR HEARING BEFORE
JUDGE EDWARD C. CUNNINGHAM
ON THE 24 DAY OF March
2002 AT 1:30 M.

DEFENDANTS BJ SERVICES COMPANY, SAMSON RESOURCES
COMPANY, SUITS DRILLING COMPANY, AND WARD PETROLEUM
CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
BASED ON STATUTE OF LIMITATIONS AND BRIEF IN SUPPORT

Defendants BJ Services Company (formerly known as the Western Company of North America), Samson Resources Company, Suits Drilling Company, and Ward Petroleum Corporation (hereinafter referred to collectively as "Movants"), move for summary judgment on Plaintiffs' claims of private nuisance, damages for public nuisance, negligence *per se*, trespass, and annoyance and inconvenience on the grounds that those claims are barred by the applicable two-year statute of limitations. In support thereof, Movants adopt and incorporate herein by reference the Motion for Partial Summary Adjudication filed on March 1, 2002, by Defendants, Nadel and Gussman, *et al.* Movants also submit additional argument and authorities addressing the statute of limitations governing Plaintiffs' claim for damages for alleged public nuisance.

STATEMENT OF UNDISPUTED FACTS

The Statement of Undisputed Facts of Nadel and Gussman, *et al.*'s Motion for Partial Summary Adjudication, paragraphs 1 through 11, apply to Movants. Paragraphs 1 through 10 of Nadel and Gussman, *et al.*'s Statement of Undisputed Facts are generally applicable to all Defendants, other than FPC Disposal, Inc. with respect to Paragraph 10,¹ and are supported by the exhibits included in Nadel and Gussman, *et al.*'s Appendix of Exhibits filed on March 1, 2002.

With respect to Paragraph 11 of Nadel and Gussman, *et al.*'s Statement of Undisputed Facts, Movants state as follows:

11. Prior to the service of Summons and the Second Amended Petition, Movants had no knowledge or notice of the lawsuit pending between the Plaintiffs and FPC Disposal, Inc., which was originally filed on April 29, 1999. *See* Affidavits of Movants attached hereto as Exhibit "A".

ARGUMENT AND AUTHORITIES

I. **Plaintiff's Claims of Private Nuisance, Negligence *Per Se*, Trespass, and Annoyance and Inconvenience are Barred by the Two-Year Statute of Limitations.**

Movants adopt and incorporate herein by reference the argument and authorities set forth in Nadel and Gussman, *et al.*'s Motion for Partial Summary Adjudication filed in this case on March 1, 2002.

¹ In Paragraph 10, Nadel and Gussman, *et al.*, state that Plaintiffs did not assert claims against them until they filed their Second Amended Petition on November 21, 2000, and that they were served with process of this action in December or January 2000. As reflected by the pleadings filed in this case, the Defendants herein also were not named as parties in this action until the Plaintiffs filed their Second Amended Petition. As reflected by the Court's files, the Defendants herein were not served with process until December 12, 13, or 14, 2000.

II. Plaintiffs' Claim for Damages Based on Alleged Public Nuisance is Barred by the Two-Year Statute of Limitations.

Plaintiffs' claim for damages for a public nuisance is barred based on the same undisputed facts and law applicable to their claim based on a private nuisance. Plaintiffs may assert that the statute of limitations does not apply to an action for damages for public nuisance based on Okla. Stat. tit. 50, § 7, which provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." Even assuming that Plaintiff can establish a public nuisance and that such nuisance amounts to an actual obstruction of a public right, the Oklahoma Supreme Court has held that § 7 means that the statute of limitations will not bar an action to abate or enjoin a public nuisance. *See Kennedy v. Hawkins*, 1959 OK 53, 346 P.2d 342, 345; *Siegenthaler v. Newton*, 1935 OK 998, 50 P.2d 192. The Oklahoma Supreme Court has never held that the statute of limitations does not apply to a claim for damages based on a purported public nuisance. To the contrary, although not mentioning § 7, the Oklahoma Supreme Court and the Oklahoma Court of Appeals has held that a two-year statute of limitations governs actions for damages based on a public nuisance. *See Henryetta v. Runyan*, 1952 OK 348, 249 P.2d 425;² *N.C. Corff Pshp. v. Oxy USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 293 (court did not distinguish between plaintiff's claims for both public and private nuisance in holding: "The statute of limitations applicable to nuisance claims in Oklahoma is two years.").

The rationale behind holding that, under Okla. Stat. tit. 50, § 7, a claim for abatement of a public nuisance brought by a private individual is not barred by limitations is that a

² In *Henryetta*, the plaintiff sued for damages, alleging that a city's construction and operation of a dam and other waterworks constituted a public nuisance. The court held that the plaintiff's claim was governed by a two-year statute of limitations. *See also, Ardmore v. Colbert*, 1915 OK 705, 152 P. 603 (court indicated that two-year statute of limitations applied to an action for damages for a nuisance which clearly constituted a public nuisance,

private individual brings an action on a public nuisance in order to protect the public rights.

See Revard v. Hunt, 1911 OK 425, 119 P. 589, 592 (private individuals seeking abatement of a public nuisance "enjoy the exalted plane occupied by the state or municipalities in their actions in such cases" and "a public nuisance cannot be unlawful as to the whole public and lawful as to its constituents").³ This rationale does not apply to a private individual's claim for damages for purported special injuries suffered by the individual caused by a public nuisance. There is no authority under which a landowner may recover damages suffered by the public at large based on the theory of public nuisance. Instead, any damages would be measured by those recoverable for a private nuisance. Plaintiffs should not be able to avoid the statute of limitations which is otherwise applicable to a private nuisance claim by also alleging a public nuisance.⁴ By analogy, the Oklahoma Supreme Court has held that the court may enjoin a continuing trespass, while disallowing damages for the same trespass that

although not denominated as such).

³ The court in *Revard* quoted extensively from *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 F. 753 (C.C.D. Cal 1884), including the following statement: "'When a private person thus obtains a standing in court, by reason of his having suffered special damages, although he can only maintain his suit for an injunction on that ground, yet the court grants relief, not solely because the nuisance is private so far as he is concerned, but because it is public, and the relief will benefit the public.'" *Revard*, 119 P. at 593, quoting *Woodruff* (emphasis added).

⁴ California and Idaho have statutory provisions similar to Okla. Stat. tit. 50, § 7. See Cal. Civ. Code § 3483; Idaho Code § 52-109. Nevertheless, both jurisdictions hold that the statute of limitations may bar a claim for damages based on a public nuisance. See, e.g., *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1142-1143, 281 Cal. Rptr. 827 (Cal. App. 3d Dist. 1991) (although statute of limitations does not bar an action brought by a public entity to abate a public nuisance, the statute of limitations applies to a private citizens' claim for damages for a public nuisance); *West v. Smith*, 95 Idaho 550, 511 P.2d 1326, 1332 (1973) ("A private owner, so injured, cannot invoke the protection of the public right to abate the nuisance, which is not barred, and thus avoid the effect of the statute of limitations upon his private right of action") (quoting *Hudson v. Dailey*, 156 Cal. 617, 630, 105 P. 748, 754 (1909)). See also *Gardenhire v. Sinclair-Prairie Oil Co.*, 141 Kan. 865, 870, 44 P.2d 280 (1935) (statute of limitations may apply to a claim of damages for a public nuisance, although there is no right to continue the pollution by prescription).

were barred by the two-year statute of limitations. *Fairlawn Cemetery Asso. v. First Presbyterian Church.*, 1972 OK 66, 496 P.2d 1185, 1187.⁵

There are federal district courts in Oklahoma that have reached conflicting decisions as to whether the statute of limitations will bar a claim for damages for a public nuisance. *See, e.g., Branch v. Mobil Oil Corp.*, 788 F. Supp. 531, 536 (W.D. Okla. 1991) ("... Section 7 of Title 50 does not suspend the operation of the statute of limitations on a claim for damages caused by a public nuisance which obstructs a public right for as long as the nuisance exists. It merely allows abatement or a civil action therefor as long as the nuisance exists"); *Fischer v. Atlantic Richfield Co.*, 774 F. Supp. 616, 619 (W.D. Okla. 1989) ("Third, the statute of limitations does not run against a public nuisance. 50 O.S. § 7 (1981)"). *See also Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 895 (10th Cir. 2000) (Okla. Stat. tit. 50, § 7 disallowed the statute of limitations "as a defense against a plaintiff seeking pollution abatement or the costs of abatement"). However, those decisions are not binding on the Oklahoma courts in deciding this state law question. *See, e.g., Schneberger v. Apache Corp.*, 1994 OK 117, ¶ 31, 890 P.2d 847, 854.

⁵ In *Fairlawn Cemetery*, the court stated:

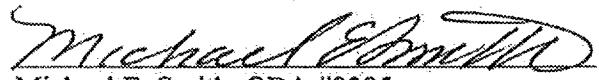
While we agree the church should be enjoined from continuing the dirt fill on Cemetery's property and should be required to remove the encroaching dirt between the wall and Cemetery's south property line, we find the plaintiff is barred by the statute of limitations in seeking to require the church to re-establish vertical alignment of the west 540 feet of its concrete fence. The restoration of the wall to its former condition is in the nature of damages for trespass which is subject to a limitation period of two years.

496 P.2d at 1187 (emphasis added).

CONCLUSION

For the above reasons, and for the reasons set forth in Nadel and Gussman, *et al.*'s Motion for Partial Summary Judgment and Brief in Support, Movants respectfully request that summary judgment be granted on all of Plaintiffs' claims as barred by the two-year statute of limitations, with the exception of their claim for abatement based on an alleged public nuisance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2002, a true and correct copy of the foregoing was mailed, postage prepaid thereon to all persons set forth below:

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Michael E. Smith

**IN THE DISTRICT COURT FOR CANADIAN COUNTY
STATE OF OKLAHOMA**

JACKIE EUGENE ELLISON, also known)
as GENE ELLISON, individually and as)
Trustee, et al.,)
Plaintiff,)
vs.) Case No. CJ-99-151-01
FPC DISPOSAL, INC., et al.,)
Defendant.)

AFFIDAVIT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Jack A. Canon, of lawful age, being first duly sworn, upon oath states as follows:

1. I am Senior Vice President-General Counsel of Samson Investment Company ("Samson").

I have been employed by Samson since November 21, 1983. As a part of my responsibilities for Samson, I am informed of all potential lawsuits and lawsuits against Samson and its affiliates, including Samson Resources Company. I have personal knowledge of the facts stated herein.

2. Prior to the service of Summons and the Second Amended Petition, in the captioned case on Samson in December 2000, Samson had no knowledge or notice of this lawsuit.

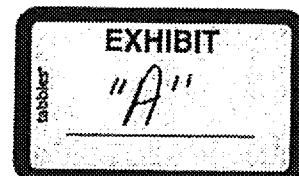
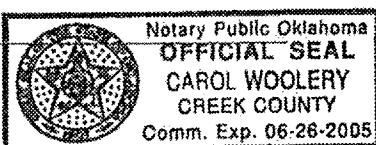
Further affiant saith not.

Jacy A. Cannon

Subscribed and sworn to before me this 27th day of March, 2002, by Jack A. Canon.

My Commission Expires:

~~Notary Public~~



IN THE DISTRICT COURT OF CANADIAN COUNTY
STATE OF OKLAHOMA

JACKIE EUGENE ELLISON, also known as GENE ELLISON, individually and as Trustee, et al.,

Plaintiffs,

1

Case No. CJ-99-151-01

FPC DISPOSAL, INC., et al.,

Defendant.

AFFIDAVIT

STATE OF OKLAHOMA)
COUNTY OF GARFIELD)
SS.

William C. Ward, of lawful age, being first duly sworn, upon oath states as follows:

1. I am President of Ward Petroleum Corporation ("Ward"). I have been an Officer/employee of Ward since 1996. As a part of my responsibilities for Ward, I am informed of all potential lawsuits and lawsuits against Ward. I have personal knowledge of the facts stated herein.

2. Prior to the service of Summons and the Second Amended Petition, in the captioned case on Ward in December, 2000, Ward had no knowledge or notice of this lawsuit.

Further affiant saith not.

W. C. Ward

Subscribed and sworn to before me this 29th day of March, 2002, by
William C. Ward

Cherry Holmer
Notary Public

My Commission Expires:

June 20, 2002

(SEAL)

IN THE DISTRICT COURT OF CANADIAN COUNTY
STATE OF OKLAHOMA

JACKIE EUGENE ELLISON, also known
as GENE ELLISON, individually and as
Trustee, et al.,

Plaintiffs

v.

Case No. CJ-99-151-01

FPC DISPOSAL, INC., et al.,

Defendant

AFFIDAVIT

STATE OF TEXAS)
) ss
COUNTY OF HARRIS)

Mark J. Airola, of lawful age, being first duly sworn, upon oath states as follows:

1. I am the Associate General Counsel of BJ Services Company ("BJ Services"). I have been an employee of BJ Services since 1995. As a part of my responsibilities for BJ Services, I am informed of all potential lawsuits and lawsuits against BJ Services. I have personal knowledge of the facts stated herein.

2. Prior to the service of Summons and the Second Amended Petition, in the captioned case on BJ Services in December, 2000, BJ Services had no knowledge or notice of this lawsuit.

Further affiant saith not.



Subscribed and sworn to before me this 28th day of March, 2002, by

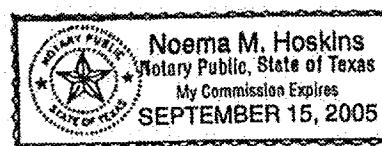
Mark J. Airola

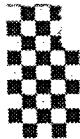
Noema M. Hoskins
Notary Public

My Commission Expires:

9-15-05

(SEAL)





IN THE DISTRICT COURT OF CANADIAN COUNTY
STATE OF OKLAHOMA

JACKIE EUGENE ELLISON, also known as GENE ELLISON, individually and as Trustee, et al.,

Plaintiffs,

vi

Case No. CJ-99-151-01

FPC DISPOSAL, INC., et al.,

Defendant,

AFFIDAVITI

STATE OF OKLAHOMA }
COUNTY OF Garfield }
ss.

Steven L. Dyche, of lawful age, being first duly sworn, upon oath states as follows:

1. I am an officer of Suits Drilling Company ("Suits"). As a part of my responsibilities for Suits, I am informed of all potential lawsuits and lawsuits against Suits. I have personal knowledge of the facts stated herein.

2. Prior to the service of Summons and the Second Amended Petition, in the captioned case on Suits in December, 2000, Suits had no knowledge or notice of this lawsuit.

Further afflict saith not.



Steven L. Dyche

Subscribed and sworn to before me this 1st day of April, 2002, by Steyen L. Dyche.

Notary Public

My Commission Expires:

9-27-2005
(SEAL)

